

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: SB 1130

INTRODUCER: Senators Peaden and Baker

SUBJECT: Firearms in Motor Vehicles

DATE: February 28, 2008 REVISED: 03/18/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/2 amendments
2.			JU	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input checked="" type="checkbox"/> | Amendments were recommended |
| | <input checked="" type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Senate Bill 1130 codifies the right of persons to possess firearms in or on their vehicles while parked on the property of businesses, employers, and other public or private entities. To the extent that these personal property rights are given statutory supremacy, the rights of real property owners are necessarily restricted by the bill. This is so because the real property owner is prohibited from limiting access to his or her real property by those who carry firearms in or on their vehicles. The bill relieves entities of certain duties, that would then apparently limit civil liability so long as the entity complies with the statute.

This bill creates a new section of the Florida Statutes, section 790.251.

II. Present Situation:

The rights of a person to carry a firearm on the property of another are expressly limited by statutes in few circumstances.¹ Existing statutes do not address the extent to which the

¹ See s. 258.157, F.S. (prohibiting the possession of firearms in the Savannas State Reserve); s. 790.145, F.S. (prohibiting the possession of concealed firearms within a pharmacy); and s. 790.115(2), F.S. (prohibiting the possession of firearms in schools).

possession of firearms may be prohibited by a public or private property owner.² However, case law has held that an employer may prohibit the possession of firearms on its property.

The right to keep and bear arms and property rights are both rooted in the Florida Constitution. The extent to which a Legislature may limit or create a right for a person to possess firearms on the property of another has not been completely resolved by the courts, although the issue is being litigated across the country.

Property Rights

The Florida Constitution declares that everyone has the right to “acquire, possess and protect property.”³ The Constitution further provides that the right to property may not be deprived without due process of law.⁴

Property rights have been described as follows.

The ownership of property carries certain rights and responsibilities. Those rights control the relationship between the property and all persons. The owner has the right to possession, control and use of the property, including the right to income or benefits from the use of the property. The owner has the right to exclude others from possession, use or control of the property. Within limits, the owner has the right to change, modify, improve, add to or subtract from the property. An owner may sell, transfer or encumber the property.⁵

The right to exclude others is ““one of the most essential sticks in the bundle of rights that are commonly characterized as property.””⁶

Nevertheless, the “Government has considerable latitude in regulating property rights in ways that may adversely affect the owners.”⁷ For example, state and federal law prohibit hotels, restaurants, and other places of public accommodation from discriminating based on race, color, religion, or national origin.⁸

Moreover, the U.S. Supreme Court, in *Pruneyard Shopping Center v. Robins*, has held that a state has a right to adopt “individual liberties more expansive than those conferred by the Federal Constitution.”⁹ In *Pruneyard*, high school students set up a table inside a shopping center and distributed pamphlets and asked passersby to sign petitions. A security guard suggested that the students move to a public sidewalk on the perimeter of the shopping center. The students left and

² *But see* s. 790.115(2)(a)3., F.S.

³ FLA. CONST., art. I, s. 2.

⁴ FLA. CONST., art. I, s. 9.

⁵ *Scripps Howard Cable Co. v. Havill*, 665 So. 2d 1071, 1075 (Fla. 5th DCA 1995).

⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

⁷ *Hodel v. Irving*, 481 U.S. 704, 713 (1987).

⁸ 42 U.S.C. § 2000a; ss. 509.092, 760.06, and 760.08, F.S.; *Hamm v. City of Rock Hill*, 379 U.S. 306, 317 (1964) (upholding the constitutionality of the Civil Rights Act of 1964, including 42 U.S.C. § 2000a).

⁹ *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

later filed a lawsuit seeking to enjoin the shopping center from denying access to circulate petitions.¹⁰

On appeal, the U.S. Supreme Court upheld the right granted by the California Constitution permitting individuals to exercise the state rights of expression and petition on the property of a privately owned shopping center.¹¹ In so holding, the Court rejected the claim that recognition of the students' rights violated the shopping center owner's federally protected property rights.¹²

Right to Keep and Bear Arms

The right to keep and bear arms is addressed by both the Florida and U.S. Constitutions. The second amendment to the U.S. Constitution states: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

Article I, subsection 8(a) of the Florida Constitution states: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."

This section of the Constitution was amended in 1990 to include a three-day waiting period on the delivery of a purchased handgun.

In *Rinzler v. Carson*, 262 So.2d 661 (Fla. 1972), the Supreme Court decided that a statute prohibiting the possession of a short-barreled rifle, shotgun, or a machine gun did not violate a machine gun owner's constitutional right to bear arms. In so doing, the Court stated: "the right to keep and bear arms is not an absolute right, but is one which is subject to the right of the people through their legislature to enact *valid police regulations to promote the health, morals, safety and general welfare* of the people."

The Legislature has exercised its prerogative many times, using its "valid police power" to regulate the possession of firearms, including such matters as who may possess them, in what manner, of what type, and in what locations. Chapter 790, F.S., is dedicated exclusively to laws governing weapons and firearms.

Florida law expressly provides that a firearm may be possessed in a vehicle or a person's place of business.¹³ Unless otherwise permitted by law, a firearm located in a vehicle must be "securely encased" or "not readily accessible for immediate use."¹⁴ As a result, one who is lawfully in possession of a firearm in a vehicle is not subject to criminal prosecution.¹⁵

¹⁰ *Id.* at 77.

¹¹ *Id.* at 79-80, and 88.

¹² *Id.*

¹³ Section 790.25(3)(l) and (n), F.S.

¹⁴ Section 790.25(5), F.S.; *compare* s. 790.25(3)(l), F.S. (stating that a firearm must be "securely encased and not in the person's manual possession").

¹⁵ The case of *Pelt v. Department of Transportation*, 664 So. 2d 320 (Fla. 1st DCA 1995) shows that a license to carry a concealed firearm did not limit an employer's power to regulate the possession of firearms by an on-duty employee. By implication, the rights to possess firearms provided in ch. 790, F.S., prohibit criminal prosecution, rather than a limit on the power of a property owner.

Moreover, a person in a vehicle may use a firearm in self defense against a person who unlawfully and forcefully attempts to enter the vehicle.¹⁶

Although there are statutory restrictions on carrying concealed weapons, there is statutory authorization to carry firearms in many situations specified in s. 790.25, F.S. For example, subsection (5) states:

“POSSESSION IN PRIVATE CONVEYANCE.--Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.”

These statutes are clear examples of the Legislature’s constitutionally authorized exercise of its police powers.

Florida is an “At-Will” Employment State

Florida is an “at-will” employment state. Essentially this means that, absent an employment contract, either party, employer or employee, may terminate the employment relationship at any time, for any reason, so long as the reason isn’t prohibited by law.

Actions for wrongful termination of employment, under the *constitutional theory* of a violation of “Basic Rights” as set forth in Article I, Section 2 of the Florida Constitution must be based upon a *state action*, and not the action of one citizen (employer) against another (employee). *Schreiner v. McKenzie Tank Lines*, 432 So.2d 567 (Fla. 1983). One citizen’s rights “shall not be construed to deny or impair others retained by the people.” *Article I, Section 1, Florida Constitution*.

The application of the right to equal protection in Article I, Section 2 is activated when the *government* intrudes into a citizen’s most basic, personal freedom from such intrusion. Consequently, there is no constitutional right to employment in Florida in the private sector.

Florida’s Constitution, in Article I, Section 2, states:

“Basic Rights. All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for

¹⁶ Section 776.013(1), F.S.

industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.”

The Legislature has enacted *statutes* addressing discrimination based upon *race, color, religion, sex, national origin, age, handicap, or marital status*. *The Florida Civil Rights Act of 1992*, s. 760-01-760.11 and s. 509.092, F.S.

These statutes provide causes of action for employment discrimination, and the methods by which they are to be pursued, against employers who employ 15 or more employees for each working day in each of 20 or more calendar weeks. Many small businesses would not fit the statutory threshold of 15 or more employees.

The statutory protections set forth protect employees from discrimination based upon *who they are*, not matters that are necessarily matters of choice or preference. These statutory protections could be viewed as an expansion, or at least a clarification from a public policy standpoint, of the constitutional Basic Rights enumerated in Article I, Section 2 of the Florida Constitution.

Reasons not inherently “identity-related,” for employing or not employing, retaining or terminating an employee are matters within the discretion of the employer and are neither constitutionally nor statutorily governed.

Right to Possess Firearms in the Parking Lot of an Employer

A few courts from other jurisdictions have addressed whether an employer may regulate the possession of firearms in a parking lot controlled by the employer. These cases have generally held that an employer may regulate the possession of firearms on an employee parking lot.

Plona v. United Parcel Service

In *Plona v. United Parcel Service*, an employee was terminated by his employer after an unloaded and disassembled handgun was discovered in his vehicle.¹⁷ The employee’s vehicle was parked in a public access parking lot used by employees and customers of the United Parcel Service (UPS). The employee filed a lawsuit for wrongful termination, and UPS moved to dismiss the lawsuit for failing to state a claim.

The federal trial court denied the motion to dismiss and found that: “the public policy of Ohio permitting citizens to bear arms, as stated in . . . the Ohio constitution, is clear enough to form the basis of a wrongful termination claim.”¹⁸ However, for the purposes of the motion to dismiss, the court assumed that the employee’s vehicle was not on UPS property. The court also stated that the parties may revisit the issue raised by the motion to dismiss if it is determined that the handgun was on UPS property.

¹⁷ *Plona v. United Parcel Service*, 2007 WL 509747 (N.D. Ohio 2007).

¹⁸ *Id.* at *2.

Hansen v. America Online, Inc.

In *Hansen v. America Online, Inc.*, several off-duty America Online, Inc., employees met at their employer's parking lot.¹⁹ While in the parking lot, the employees transferred their firearms into one vehicle before going target shooting at a local gun range. The employees' activities in the parking lot were captured on a video camera. Several days later the employees were discharged. The employees filed a lawsuit alleging that their termination violated public policy. The court held that an employee, absent an agreement to the contrary, does not have the right to carry a firearm on his employer's property.

Bastible v. Weyerhaeuser

In *Bastible v. Weyerhaeuser*, an employer became concerned about drug use on its property.²⁰ The employer then arranged for a sheriff to use dogs to conduct a search of the employee parking lot for drugs. However, the dogs also signaled the presence of firearms in the vehicles. The employees found with firearms in their vehicles were terminated. The employees sued claiming that the terminations violated their constitutional right to bear arms. The *Bastible* court upheld the terminations.

Legislation and Constitutional Challenge in Oklahoma

Subsequent to the decision in *Bastible v. Weyerhaeuser*, the Oklahoma Legislature enacted statutes that essentially prohibited employers from enforcing policies that would prevent employees from keeping secured firearms in their vehicles on company property. The Oklahoma Legislature amended the law the following year to address business concerns about civil liability issues. The language of the Oklahoma legislation was very much like the language and apparent intent of Senate Bill 1130. In response to the statutes enacted by the Oklahoma Legislature, several businesses filed a lawsuit in federal court challenging the laws.²¹

The Federal Court for the Northern District of Oklahoma was petitioned by the businesses to block the enforcement of the Oklahoma statutes and to declare the statutes unconstitutional.

The businesses raised three separate constitutional arguments in support of a permanent injunction against the enforcement of the statutes. The court fully analyzed all challenges but ultimately ruled, in October 2007, that the statutes were pre-empted by federal law, specifically the Occupational Safety and Health Act (OSHA).

Policy Questions – The Law is Evolving

The United States Supreme Court is taking up an important case in this general area of the law this March, with a decision expected by late June. It is anticipated that the question of whether a person has an *individual constitutional right* to possession of firearms for personal safety, compared to the right to possess firearms as a more general "well regulated militia" right, may be addressed by the Court. However, even if the Court does address the question and put the Second Amendment into a clearer perspective, the issues raised in Senate Bill 1130 may not become any more clear. This is so because even if the Court does find an individual right exists, the case will

¹⁹ *Hansen v. America Online, Inc.*, 96 P.3d 950 (Utah 2004).

²⁰ *Bastible v. Weyerhaeuser*, 437 F.3d 999 (10th Cir. 2006).

²¹ *CONOCOPHILLIPS Co. v Henry*, 520 F.Supp.2d 1282 (N.D.Okla. 2007).

not likely (because of its facts) decide whether that right deserves greater or lesser constitutional protection when pitted against the rights of real property owners.

III. Effect of Proposed Changes:

Senate Bill 1130 creates a new section of Florida law that will codify legislative policy regarding statutory rights of lawful firearm owners and carriers as contrasted with the statutory rights of public or private entities.

The bill prohibits entities, including all public-sector employers, from violating what are called the “constitutional rights” of a customer, employee, or invitee in the following ways:

- by prohibiting the lawful possession of properly secured firearms within or upon a private motor vehicle in the entity’s parking lot;
- by inquiring, verbally or in written form as to the presence of a firearm or by conducting a search for same – searches are limited to those lawfully conducted by on-duty law enforcement personnel;
- by conditioning employment upon not keeping a firearm in a motor vehicle;
- by limiting access to the entity’s parking lot based upon whether there is a firearm within the vehicle; and
- by discriminating or terminating employment or expelling a customer or invitee because he or she exercises the right to keep and bear arms or lawfully defend oneself.

The prohibitions listed above do not apply, under the bill, upon:

- school property;
- state correctional institutions;
- property where there is substantial national defense, aerospace, or domestic security activity;
- property where the manufacture, use, storage or transportation of certain combustible or explosive material is the primary business conducted;
- company vehicles; or
- property whereupon federal law or pre-existing general state law prohibits possession of a firearm.

The bill declares that, except for those employers or entities listed above, other public or private entities or employers are relieved of certain duties which, therefore, bestows immunity from civil liability so long as the action or inaction is related to compliance with the provisions of the bill.

The bill specifically eliminates the duty to:

- prohibit lawfully possessed firearms within vehicles in the parking lot;
- search vehicles or inquire about the presence of firearms;
- condition employment upon an agreement about the employees’ possession of a firearm in the parking lot; or
- terminate employment based upon lawful firearm possession or use for lawful defensive purposes.

Certain terms are defined by the bill and legislative intent language and a short title is provided. The Office of the Attorney General is given enforcement authority of the Act. The act becomes effective upon becoming law and prospectively applies.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Should litigation follow from the enactment of this legislation, it may be argued that portions of the bill encroach upon power of the courts to interpret the constitution insofar as the bill appears to bestow certain “constitutional rights.”

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

Barcode 096352 by Criminal Justice on 3/18/08:

This amendment clarifies, and possibly extends the limits on the immunity provided under the bill's "no duty" clauses in subsection (3) of the newly-created statute. It does so by amending paragraph (b) to state that an entity or employer is not liable for the actions of an employee, customer, or invitee's actions involving a firearm brought to the premises under the protections provided (for the firearm owner) under the bill.

Barcode 601090 by Criminal Justice on 3/18/08:

This amendment includes Private Prisons among those entities on the list of those to whom the bill does not apply at all. State prisons had been listed, and this amendment corrects an oversight.